

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

SCOTT THELANDER,

Petitioner,

v.

ANTHONY KANE, Warden, and
ARNOLD SCHWARZENEGGER, Governor,

Respondents.

No. C 05-4689 CW

ORDER DENYING
RESPONDENT'S
MOTION TO DISMISS
AND ORDERING
BRIEFING ON
HABEAS PETITION

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In this action for a writ of habeas corpus pursuant to 28 U.S.C. § 2254, Petitioner Scott Thelander, a prisoner incarcerated at the Correctional Training Facility in Soledad, California, alleges that his right to due process was violated in being denied parole for the eighth time.

Respondent Anthony Kane moves to dismiss this action for lack of subject matter jurisdiction on the ground that there is no federally protected liberty interest in parole and therefore no federal due process rights involved in parole decisions. Petitioner opposes the motion. Having considered all the papers filed by the parties, the Court DENIES Respondent's motion to

1 dismiss and orders briefing on the habeas petition.

2 BACKGROUND

3 On May 27, 1981, Petitioner was convicted of second degree
4 murder. The Board of Parole Hearings¹ denied Petitioner parole
5 seven times on the following dates: June 22, 1990, April 15, 1992,
6 April 19, 1994, July 5, 1995, July 1, 1997, June 5, 2001 and June
7 7, 2002. On September 18, 2003, the Board denied Petitioner parole
8 for the eighth time. In this habeas petition, Petitioner
9 challenges the Board's September 18, 2003 parole denial.
10 Petitioner claims that the Board's decision violates his liberty
11 interest in being released on parole, an interest protected by the
12 federal constitutional right to due process.

13 DISCUSSION

14 Respondent moves to dismiss for lack of subject matter
15 jurisdiction, arguing that California law does not create a
16 federally protected liberty interest in parole release.

17 Although a convicted person has no inherent or constitutional
18 right to early release on parole, a State's statutory parole scheme
19 may create "a presumption that parole release will be granted" if
20 it uses mandatory language. Greenholtz v. Inmates of Nebraska
21 Penal & Corr. Complex, 442 U.S. 1, 12 (1979) (finding that the
22 Nebraska parole statute, which provides that the Board "shall"
23 release the prisoner subject to certain restrictions, creates a due
24 process liberty interest in release on parole). This presumption

26 ¹The Board of Prison Terms was abolished effective July 1,
27 2005, and replaced with the Board of Parole Hearings. Cal. Penal
Code § 5075(a).

1 of parole release gives rise to a constitutionally protected
2 liberty interest that cannot be denied without adequate due process
3 protection. Id. at 11-16; see also Board of Pardons v. Allen, 482
4 U.S. 369, 376-78 (1987) (finding that the Montana parole statute,
5 which provides that board "shall" release the prisoner subject to
6 certain restrictions, creates a due process liberty interest in
7 release on parole).

8 California's parole scheme is set forth in California Penal
9 Code § 3041.² Section 3041 instructs that the Board "shall set a
10 release date" unless it decides this is inadvisable based on the
11 nature and timing of the offense and in consideration of public
12 safety:

13 [a] One year prior to the inmate's minimum
14 eligible parole release date a panel of two or
15 more commissioners or deputy commissioners
16 shall . . . meet with the inmate and shall
17 normally set a parole release date . . . The
18 release date shall be set in a manner that will
19 provide uniform terms for offenses of similar
20 gravity and magnitude in respect to their
21 threat to the public, and that will comply with
22 the sentencing rules that the Judicial Council
23 may issue and any sentencing information
24 relevant to the setting of parole release
25 dates. The board shall establish criteria for
26 the setting of parole release dates and in
27 doing so shall consider the number of victims
28 of the crime for which the inmate was sentenced
and other factors in mitigation or aggravation
of the crime . . . [b] The panel or the board,
sitting en banc, shall set a release date
unless it determines that the gravity of the
current convicted offense or offenses, or the
timing and gravity of current or past convicted
offense or offenses, is such that consideration
of the public safety requires a more lengthy
period of incarceration for this individual,

² All further statutory references in this Order are to the
California Penal Code, unless otherwise specified.

1 and that a parole date, therefore, cannot be
2 fixed at this meeting.

3 Cal. Penal Code § 3041(a), (b).

4 Respondent contends that a recent decision of the California
5 Supreme Court, In re Dannenberg, 34 Cal. 4th 1061 (2005),
6 establishes that California prisoners have no liberty interest in
7 parole and therefore no federal due process rights in connection
8 with parole decisions. The Ninth Circuit has recently rejected
9 this contention. Sass v. California Bd. of Prison Terms, 2006 WL
10 2506393 at *3 (9th Cir. Aug. 31, 2006). Therefore, the Court has
11 subject matter jurisdiction under 28 U.S.C. § 2254 to decide
12 whether Petitioner's Fourteenth Amendment right to due process was
13 violated by the Board's determination that he was not suitable for
14 parole. Accordingly, Respondent's motion to dismiss is DENIED.

15 CONCLUSION

16 For the foregoing reasons, the Court DENIES Respondent's
17 motion to dismiss and orders briefing on the merits of the
18 petition. Respondent shall have thirty days from the date of this
19 order to file an answer. Petitioner shall have thirty days
20 thereafter to file a traverse.

21 IT IS SO ORDERED.

22 Dated: 9/19/06



23 CLAUDIA WILKEN
24 United States District Judge
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